IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6516

CHARLES D. BRADEN,

Petitioner,

—v.—

THIRTIETH JUDICIAL CIRCUIT COURT OF THE COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amicus curiae. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has refused to consent. Both letters have been filed with the Clerk of the Court.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 180,000 members solely dedicated to defending the liberties guaranteed by the Bill of Rights. In its 52-year existence, it has been particularly concerned that procedural remedies, especially one so fundamental as the Great Writ, be fully available to rectify the denial of civil liberties.

In accord with that concern, we filed an amicus curiae brief in *Schlanger* v. *Seamans*, 401 U.S. 487 (1971) and represented the petitioner in *Strait* v. *Laird*, 32 L. Ed.2d 141 (1972), both of which involved the availability of habeas corpus relief to members of the armed services seeking release from military custody.

In this case the high office of the Writ is invoked to secure another fundamental liberty—the right to a speedy trial. The decision below purports to deny the petitioner any forum to vindicate his speedy trial right. The effect of the decision is a constitutionally prohibited suspension of the Writ.

The purpose of this brief is to suggest that the decision below is inconsistent with both the modern reach of the habeas corpus remedy and this Court's concern to make the writ available to new classes of petitioners like the one here.

Respectfully submitted,

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The interest of the American Civil Liberties Union is set forth in the preceding motion for leave to file this brief.

Statement of the Case

In June 1967, a Kentucky state grand jury returned a two count indictment against petitioner, charging him with store-house breaking and safe-breaking. In November, 1967, he escaped from the custody of Kentucky authorities and was subsequently arrested in Alabama on felony charges pending in that state. Kentucky then lodged a

detainer against petitioner while he was awaiting trial on the Alabama charges. In February, 1969, while still in custoday in Alabama, petitioner filed a demand for trial on the Kentucky indictment. Kentucky officials, despite this Court's decision in *Smith* v. *Hooey*, 393 U.S. 374 (1969), refused to secure petitioner for trial. Thereafter, petitioner was convicted of the Alabama charge and received a five year sentence which he is presently serving. His attempts to secure a trial on the Kentucky charges, by motions in the Kentucky courts, proved unsuccessful.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Kentucky, pursuant to 28 U.S.C. Sections 2241 and 2254. He alleged that his constitutional right to a speedy trial was being violated because of the refusal of the Kentucky authorities to secure his return from Alabama for trial on the Kentucky indictment. The district court, finding that the Kentucky state authorities were under an affirmative obligation to secure Braden for trial, gave them sixty days to do so or suffer dismissal of the charges. On appeal, the Sixth Circuit reversed, holding that the federal district court in Kentucky lacked jurisdiction to hear the habeas corpus proceedings.

ARGUMENT

Prisoners confined within one federal district, who seek to challenge the constitutional validity of detainers lodged by public officials located in another district, may seek federal habeas corpus relief in either district.

Introduction

The issues in this case and the dilemma they embody are the product of the doctrinal tension between *Ahrens* v. *Clark*, 335 U.S. 188 (1948) and subsequent decisions of this Court, particularly *Peyton* v. *Rowe*, 391 U.S. 54 (1968), which have expanded the reach and availability of habeas corpus. The practical consequence is that this petitioner falls between two jurisdictional stools. He apparently cannot assert his speedy trial claim in either the district where he is confined (Alabama) or the district where he has been charged (Kentucky).

Amicus submits that *Ahrens* does not necessarily require such a result; but if it is thought to compel that result, it must be overruled. Whether or not it was properly decided at the time, see *Developments—Federal Habeas Corpus*, 83 Harv. L. Rev. 1042, 1160-65 (1970), it has been by-passed by the thrust of more recent decisions. Those decisions require that petitioners such as the one here be entitled to challenge the validity of detainers in either the district of confinement or the district from which the detainer issued.

A. The petitioner must be afforded some federal forum in which to raise his claim.

The petitioner Braden comes to this Court in a unique position. Ultimately, he must prevail; for in the end, he must be afforded *some* federal district court in which to

present his constitutional challenge to the pending state court prosecution and the detainer lodged against him. The Constitution will permit no less. Article I, Section 9; *Ex Parte Bollman*, 4 Cranch 75 (U.S. 1807); *Ex Parte Milligan*, 4 Wall. 2, 18 L.Ed. 281 (1866); *Ex Parte Merryman*, Fed. Case No. 9487 (1861). The decision below, in appearing to sanction less,[1] represents a retreat from the

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[1] The court below assumed that its decision might "result in Braden's inability to find a forum in which to assert his constitutional right to a speedy trial . . . because the rule in the Fifth Circuit, where [petitioner] is incarcerated appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition." 454 F.2d at 146. See generally, Tuttle, *Catch 2254: Federal Jurisdiction and Interstate Detainers*, 32 U. Pitt. L. Rev. 489 (1971). As we have suggested, such a result would be patently unconstitutional, calling into question the validity of Section 2241 as applied.

But the dilemma is avoidable, *cf. Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring), for none of the Fifth Circuit cases cited below necessarily compel a result which creates a forumless petitioner. In *May* v. *Georgia*, 409 F.2d 203 (5th Cir. 1969) the court merely held that it could not determine from the record whether the petitioner's demand on the state which had issued the detainer was sufficiently explicit so that it could be construed to constitute a request for trial under *Smith* v. *Hooey*, 393 U.S. 374 (1969), noting that if a sufficient demand had been made then the district from which the detainer issued could grant the writ. 409 F.2d at 204-05. The court also suggested that a proceeding could be brought in the district of confinement. Similarly, the per curiam decision in *Rodgers* v. *Louisiana*, 418 F.2d 237 (1969) did not involve a detainer issue or an effort to seek a speedy trial on a pending charge. Rather, the petitioner sought to attack directly, while imprisoned in Texas, seven unserved sentences imposed by Louisiana courts. And, insofar as the mere existence of the unserved Louisiana sentences did create some current disability, the Fifth Circuit's ruling is inconsistent with *Strait* v. *Laird*, 32 L.Ed.2d 141 (1972). Finally, *Flanagan* v. *Arizona*, 313 F. Supp. 664 (S.D. Tex. 1970), supports the right to file in the district of confinement. There, the federal court in that district permitted the petition to be filed but then transferred it, for reasons of comity, to the federal district court encompassing the state from which the detainer emanated. Implicit in such a

increasingly liberal interpretation of the jurisdictional reach of the Great Writ. See, e.g., *Peyton* v. *Rowe*, 391 U.S. 54 (1968); *Smith* v. *Hooey*, 393 U.S. 374 (1969); *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *Jones* v. *Cunningham*, 371 U.S. 236 (1962); *Strait* v. *Laird*, 32 L.Ed. 2d 141 (1972); *Kane* v. *Virginia*, 419 F.2d 1269 (4th Cir. 1970); see also, *Bishop* v. *Medical Superintendent*, 377 F.2d 467 (6th Cir. 1967); *Smith* v. *Campbell*, 450 F.2d 829 (9th Cir. 1971). It ignores this Court's repeated teaching that habeas corpus, which is "both the symbol and guardian of individual liberty," *Peyton* v. *Rowe*, *supra*, 391 U.S. at 58, "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, *supra*, 371 U.S. at 243. Neither this Court's decision in *Ahrens* v. *Clark*, *supra*, nor the legislative history underlying the habeas corpus statute, nor the policy considerations in administering federal habeas corpus require the result reached below.

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transfer is the assumption that the action was properly brought in the district of confinement in the first instance. 28 U.S.C. Section 1404(a); See *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

In any event, the primary issue before this Court is not whether petitioners with outstanding detainers have an additional forum in the district of confinement, see *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176, 1183 n. 8 (2nd Cir. 1970); *Word* v. *North Carolina*, 406 F.2d 352, 364-366 (4th Cir. 1969) (Sobeloff, J. concurring); although we submit they do, see pp. 14-16, *infra*. Rather, the question is whether there is a forum in the district out of which the detainer was isued, and, if so, whether petitioner's choice of forums is to be respected. Questions of judicial comity and convenience may be resolved through the venue mechanisms of 28 U.S.C. Section 1404(a). Cf. *Smith* v. *Campbell*, 450 F.2d 829, 834 (9th Cir. 1971).

B. *The ruling below is not compelled by the decision in Ahrens v. Clark, 335 U.S. 188 (1948) nor by the history or policies underlying the federal habeas corpus statutes.*

In *Ahrens* v. *Clark*, the Court was called upon to consider the question of whether the "within their respective jurisdictions" provision of the predecessor statute to 28 U.S.C. Section 2241 required, as a matter of threshold jurisdiction, the physical presence of the petitioner within the geographical boundaries of the district court in which the petition for the writ was filed. The petitioners in *Ahrens* were 120 German aliens confined at Ellis Island, New York, awaiting deportation as threats to the national security. Seeking immediate release, they filed a habeas corpus petition in the United States District Court for the District of Columbia, naming as respondent the Attorney General, under whose order they were being deported.

In affirming the lower courts' dismissal of the petition, Justice Douglas, writing for the majority, held that

> . . . the jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the Court . . . 335 U.S. at 192 (footnote omitted).

In reaching that result, this Court relied heavily on its reading of the history of the statute and the practical difficulties perceived as consequences of a contrary decision: ". . . it would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections perhaps thousands of miles from the District Court that issued the writ." 335 U.S. at 191. And even while defering to such policy considerations, the ma-

jority opinion specifically noted that "in some situations return of the prisoner to the court where he was tried and convicted might seem to offer some advantages." 335 U.S. at 191.

When viewed from the proper historical context, this caveat becomes quite significant. At the time *Ahrens* was decided, habeas corpus could only be utilized to secure immediate release from confinement. *McNally* v. *Hill*, 293 U.S. 131 (1934). The availability of habeas corpus relief to secure more than that was not recognized until 15 years after *Ahrens*, when this Court held that the habeas corpus remedy could be used to test a conviction while the petitioner was on parole. *Jones* v. *Cunningham*, *supra*. And it was five years after that before the Court held that habeas corpus would lie to challenge a conviction after the sentence was completely served, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968) or before it had even commenced, *Peyton* v. *Rowe*, *supra* (overruling *McNally* v. *Hill*, *supra*). Thus, while *Ahrens* purported to speak in broad terms, at its farthest reach, it "applies only to the jurisdiction of the district courts in habeas corpus proceedings commenced by petitioners seeking immediate release from confinement." *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176, 1181 (2nd Cir. 1970).

Accordingly, the rationale of *Ahrens* has only minimal relevance to the new class of petitioners created by the combination of *Peyton* v. *Rowe*, *supra* and *Smith* v. *Hooey*, *supra*. Unlike the *Ahrens* petitioners, Mr. Braden does not contest his present confinement and does not direct his quarrel at his current custodian.[3] Rather, he seeks to quash

[3] Of course, the existence of a detainer may also have impact on the petitioner's *current* confinement, for example, by rendering him ineligible for parole.

the Kentucky detainer because that State has refused to allow the resolution of the pending charges and has failed to afford the speedy trial to which the petitioner is constitutionally entitled.[8] State remedies having been exhausted by the petitioner, the most appropriate court to resolve this type of dispute is the federal court in Kentucky.

The dissenters in *Ahrens* perceptively anticipated that such potential problems might arise from the implications of the majority decision:

> If this is or is to become the law, the full ramifications of the decision are difficult to forsee. It would seem that a great contraction of the writ's classic scope and exposition has taken place, and much of its historic efficacy may have been destroyed. For if absence of the body from the jurisdiction is alone conclusive against existence of power to issue the writ, what of the case where the place of imprisonment, whether by private or public action, is unknown? What also of the situation where that place is located in one district, but the jailer is present in and can be served with process only in another? And if the place of detention lies wholly outside the territorial limits of any federal jurisdiction, although the person or persons exercising restraint are clearly within reach of such authority, is there to be no remedy, even though it is American citizens who are wrongfully deprived of their liberty and Americans answerable to no other power who deprive them of it, whether purporting to act officially or otherwise? In all these case may the

[8] Unfortunately, this reluctance to comply with the requirements of *Smith* v. *Hooey*, *supra*, occurs frequently. See Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753, 754 (1971).

> jailers stand in defiance of federal judicial power, and plead either the accident of the locus of detention outside the court's territorial limitations, or their own astuteness in so selecting the place, to nullify judicial competence? 335 U.S. at 195 (footnotes omitted).

Some of these problems have been alleviated by legislation. See 28 U.S.C. Sections 1391(e), 2241(d), 2255.[4] Others have been resolved by the decisions of this Court making the writ responsive to new classes of petitioners. See, e.g., *Strait* v. *Laird, supra; Peyton* v. *Rowe, supra; Hirota* v. *MacArthur*, 338 U.S. 197 (1948).

That is the approach which is required here. *Ahrens* is not an insurmountable barrier to the result petitioner seeks. Read in light of the policy problems with which the majority there was concerned, *Ahrens* can be viewed as a decision premised on traditional venue considerations. The Second and Fourth Circuits have properly so interpreted it. In *Word* v. *North Carolina*, 406 F.2d 352 (4th Cir. 1969), the Fourth Circuit characterized *Ahrens* as "little more than a precatory direction." 406 F.2d at 359. And the Second Circuit noted that:

> . . . the most convincing rationale for the *Ahrens* decision—the goal of insuring that an application for a writ of habeas corpus will be considered by the district court best suited to grant the relief sought—provides no stronger support for extension of the *Ahrens* rule to the facts before us than do the factors articulated

[4] The interstate Agreement on Detainers goes far toward eliminating the problems posed by the instant case. See, generally, Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753 (1971). While most States are parties to the Agreement, Alabama and Kentucky, unfortunately, are not. *Id.* at 756-57, n. 21.

by the Court in the *Ahrens* opinion. *United States ex rel. Meadows* v. *New York, supra* 426 F.2d at 1182.

Thus, the result in *Ahrens* was premised on a balancing of venue considerations. Such factors require the opposite result here.

Similar considerations also underlay the legislative history detailed in *Ahrens*. A ruling that the courts below had jurisdiction to entertain petitioner's application is not inconsistent with that history.

In attempting to discern the meaning of the phrase "within their respective jurisdictions", as contained in the Act of February 5, 1867, 14 Stat. 385, this Court noted that the addition of the language had been the result of an expressed Congressional concern that the bill, as originally introduced in the Senate, might permit "a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further States." Cong. Globe, 39th Congress, 2nd Session 730. As a result the language in question was added. *Id.*, at 790. But this concern, emphasized in *Ahrens*, supports rather than undermines the petitioner's position. For, as the Second Circuit has stated,

> Should we hold that a district judge in . . . the very district in which [petitioner] was sentenced, cannot entertain his petition, the fears expressed on the floor of Congress would be realized, for then, a district judge sitting in the State of Florida would have the duty to adjudicate an application for habeas corpus presented by a petitioner . . . in custody pursuant to the laws of Vermont. *United States ex rel. Meadows* v. *New York, supra*, 426 F.2d at 1181.

Accord, *Word* v. *North Carolina, supra,* 406 F.2d at 359-360. The federal court in Kentucky is the suitable forum to decide whether the State of Kentucky has violated Braden's Sixth Amendment rights. As Judge Bratcher correctly concluded in granting Braden's petition:

> "Since it is the State of Kentucky which must take action, it follows that jurisdiction rests in this district which has jurisdiction over the necessary state officials." *Braden* v. *Thirtieth Judicial Circuit Court of the Commonwealth of Kentucky,* —— F. Supp. ——, No. 6793 (W.D. Ky., Feb. 25, 1971), Memorandum Opinion, p. 3.

The reasoning in cases such as *Meadows, supra,* and the position of the petitioner here are thus in accord with the Congressional concerns enunciated in 1867: "The court best situated to grant this relief is a district court located in the state of [sentencing]." *United States ex rel. Meadows* v. *New York, supra,* 426 F.2d at 1183.

The result sought by petitioner is not only consonant with the legislative history identified in *Ahrens,* but also it does not conflict with the policy considerations of concern to the Court, primarily the wholesale transportation of prisoners. In *United States* v. *Hayman,* 342 U.S. 205, 220-223 (1951), this Court had no difficulty in assuring the lower federal courts that the interstate transportation of prisoners for Section 2255 hearings could be accomplished via the "All Writs Act," 28 U.S.C. §1651. Furthermore, and as demonstrated by this case, the physical presence of the petitioner is not always necessary to an adjudication of the issue. In those cases where it becomes clear that the presence of the petitioner is required, additional considerations compel

a holding that the state from which the detainer has issued or the sentence was rendered is a permissible forum. For example, to hold that a prisoner, seeking to challenge a future restraint imposed by a state other than the one in which he is incarcerated, must proceed in a remote state without witnesses who, for the most part, are undoubtedly in the demanding state, would serve to work an unconscionable denial of due process and would severely undermine *Peyton* v. *Rowe, supra.* Moreover,

> granting jurisdiction only to the state of confinement would prejudice not only the petitioner but also the respondent for the officials of the sentencing state rather than the state of incarceration are chiefly interested in the validity of the challenged conviction [or detainer] and, consequently, in opposing or, if the public interest so dictates, advocating the grant of the writ. *United States ex rel. Meadows* v. *New York, supra,* 426 F.2d at 1181.

In sum, a decision holding that jurisdiction exists below will not necessarily result in the wholesale transportation of state prisoners. Nor will it cause any greater practical difficulties than are manifest in the administration of Section 2255. Finally, such a decision will have the advantage of enabling challenges to detainers to be heard in the most appropriate and convenient federal forum.

C. *A petitioner's choice of forum should prevail.*

If, as we urge, the Court holds that the Western District of Kentucky had jurisdiction to entertain the petitioner's habeas corpus application, then a major problem will have

been resolved. But related problems will persist, as they did in the wake of *Nelson* v. *George*, 399 U.S. 224 (1970) where a decision on the central issue in the present case was not forthcoming. *Nelson* perpetrated a split among the circuits on the various problems attendant upon interstate detainers.

Four approaches have emerged. First, some courts have held that only the district of confinement has jurisdiction, e.g., *United States ex rel. Van Scoten* v. *Pennsylvania*, 404 F.2d 767 (3rd Cir. 1968). Others have held, with limited exceptions, that only the demanding or sentencing district has jurisdiction. See *Word* v. *North Carolina*, *supra*. A third holding, represented by *United States ex rel. Meadows* v. *New York*, *supra*, is that jurisdiction in the two districts is concurrent, with a preference for the demanding or sentencing jurisdiction. Finally, it has been held that jurisdiction lies in the district of confinement, but if the demanding jurisdiction follows a *Word*-type rule, transfer of the case to that district may be appropriate. *George* v. *Nelson*, 410 F.2d 1179 (9th Cir. 1969), *aff'd on other grds.*, 399 U.S. 224 (1970).

Certainly the most drastic consequence of this uncertainty is the plight of an inmate confined in a jurisdiction which adheres to the *Word* rule (i.e. that relief should be sought in the demanding state) with a detainer filed against him by a state, such as Kentucky, which lies within a circuit which adheres to a strict *Ahrens* rule. Such a prisoner "will, in classic renvoi terms, be snubbed by the federal court in the district of his confinement *and* by the federal court in the demanding district each court contending that he ought to seek relief in the other district." Wexler and Hershey, *Criminal Detainers in a Nutshell*, *supra* at 722.

See e.g., *United States ex rel. Pitcher* v. *Pennsylvania*, 314 F. Supp. 1329 (E.D. Pa. 1970).

Amicus suggests that in order to avoid such dilemnas, petitioners such as the one here should be afforded a choice of forums, thus allowing them to file their applications in either district. Jurisdiction in the detaining district can be premised on an agency theory, see *Word* v. *North Carolina*, *supra*, 406 F.2d 358, n. 6, cf. *Strait* v. *Laird*, 32 L. Ed.2d 141 (1972), or can be found to exist because of the effects of the detainer on a prisoner's current confinement. Cf. *Carafas* v. *La Vallee*, *supra*, *Peyton* v. *Rowe*, *supra*. The important point is that this Court should adopt the concurrent jurisdiction theory enunciated by the Second Circuit in *Meadows*, but with the caveat that the original choice of forums may be made, as here, by the petitioner himself. Cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1946) ("... unless the balance is strongly in favor of the [respondents', the petitioner's] choice of forum should rarely be disturbed.") The policy considerations discussed above justify such a conclusion, and issues of convenience can be resolved through the mechanism of 28 U.S.C. Section 1404a.

CONCLUSION

For the reasons set forth above the decision of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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